UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs. **1:18-cr-348 (MAD)**

CHRISTOPHER J. PRATT,

Defendant.

APPEARANCES: **OF COUNSEL:**

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Mae A. D'Agostino, U.S. District Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Defendant has been charged with possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). *See* Dkt. No. 1 at 1. Defendant now moves to suppress (1) evidence seized during a search of his home on June 5, 2017 and (2) statements he made to police on that day, arguing that the search and interviews violated his Fourth, Fifth, and Fourteenth Amendment rights. *See* Dkt. No. 41 at 1. For the following reasons, the motion to suppress is denied.

II. BACKGROUND

A. Facts

1. Search Warrant Application

The search warrant application was completed by Amy L. Kowalski, an investigator with the Albany County Sheriff's Office and task force officer in the Federal Bureau of Investigation ("FBI") Child Exploitation Task Force in Albany, New York. *See* Dkt. No. 41-3 at 1. Investigator Kowalski relied on information she received from another member of the FBI Child Exploitation Task Force, Investigator Glen Vidnansky. *Id.* at 7. Investigator Vidnansky had conducted a "peer-to-peer file sharing investigation . . . to identify those individuals sharing child pornography through the BitTorrent network," a public, internet-based file sharing network. *Id.* at 8. The affidavit describes the investigation as follows:

> On November 2, 2016, Investigator Vidnansky connected directly to IP Address 108.183.10.193 and downloaded files of interest with assigned sha1 values. Said files consisted of child pornography and were located in the "Share Folder" of IP Address 108.183.10.193. The device at IP Address 108.183.10.193 was the sole candidate for each download, and as such, each file was downloaded directly from said IP Address. Investigator Vidnansky viewed the files and found that they appeared to depict child pornography from his training as Police Officer, and Child Exploitation Task Force Officer with the Federal Bureau of Investigations. The 'Shared Folder' of IP Address 108.183.10.193 is registered to an address in . . . Albany with Time Warner Cable as the internet service provider.

Id. According to Time Warner Cable, the IP Address 108.183.10.193 has been assigned to Christopher J. Pratt, at XXX Western Avenue, Albany, NY 12203, since January 24, 2016. *Id.*

On June 1, 2017, an Albany City Court judge granted the search warrant application and issued a warrant authorizing the search of Defendant's home. *See* Dkt. No. 41-4 at 1-2.

2. Interview at Defendant's Home

On June 5, 2017, at approximately 6:00 a.m., Defendant awoke to a knock at the side door of his home. *See* Dkt. No. 41-1 at ¶ 3. Defendant opened the door and saw several law enforcement agents with bulletproof vests and handguns who "moved quickly through the

doorway" to execute the search warrant. *See id.* at ¶¶ 4-5, 13. When asked if there were any other occupants home, Defendant answered that his wife, who is paraplegic and does not speak English, was in bed. *See id.* at ¶¶ 6-7. Agent Dave Fallon introduced himself and his partner Amy Kowalski and asked Defendant if there was "some place we can go to talk?" *See* Dkt. No. 51, Audio Recording (hereinafter "Audio") at 0:0:38-0:0:40. Defendant was "guided" to a small room in the rear of his home, where he was interviewed. *See* Dkt. No. 41-1 at ¶ 8. Agent Fallon told Defendant that they had a warrant to search his home "based upon some activity on the internet that we traced back here." *See* Audio at 0:1:20-0:1:26; *see also* Dkt. No. 41-1 at ¶ 13. Defendant cooperated with the agents, showed them to his computer, and spoke with the agents for approximately an hour and a half. *See* Audio at 0:1:30-0:1:45. The interview was recorded, and Defendant was not read his *Miranda* rights before the interview. *See* Dkt. No. 41-1 at ¶ 16.

As the Government notes, Defendant made a number of statements about his viewing of child pornography during this interview. *See, e.g.*, Audio at 0:5:07-0:7:17 (stating that he has "seen things on BitTorrent that are underage . . . I don't think I saved anything . . . I have seen in my lifetime child pornography not that I've saved, not that I've searched"); *id.* at 0:14:40-0:15:50 (stating that the label "JB" on a computer folder stood for "jail bait," and signified that it contained child pornography); *id.* at 0:26:36-0:28:06 (stating that "there was one month when my computer was overrun by so-called child pornography stuff"). Not only did Defendant answer the agents' questions, but he elaborated on many of his answers without further prompting, providing the agents with a lot of information about his pornography preferences, how he searches for porn, and where he goes to access it. *See, e.g.*, *id.* at 0:1:30-0:15:50, 0:26:36-0:28:06. The tone of the interview was conversational, Defendant spoke freely without many interruptions from the agents, and the agents never threatened him or raised their voices. Defendant was allowed to put

on his socks and shoes after he indicated that he was cold, and was permitted to use the bathroom. *See id.* at 0:24:15-0:26:40, 1:36:40-45. Defendant never asked to end the interview, to leave the room, or to speak with his wife, and never indicated that he was concerned or uncomfortable.

Defendant now claims that he felt "confined in a place not of my choosing," and he did not believe that he was free to "terminate the encounter," "leave the home or even the areas of the home where [he] had been directed to be by law enforcement agents," or choose not to answer the agents' questions. *See* Dkt. No. 41-1 at ¶¶ 15, 16. Defendant states that an agent was standing in the doorway to obstruct his exit from the room, and although he could not see the activity of the other agents in his home, he could hear, "what sounded like a large number of law enforcement officials roaming throughout my house." *See id.* at ¶¶ 9-11. Finally, Defendant states that he was extremely concerned about his wife's well-being, but he was "not allowed to go to her, to speak to her or even simply to look to see if she was o.k." *See id.* at ¶¶ 11-12.

3. Interview at the New York State Police Office

Defendant was arrested and brought to the New York State Police Office in Latham, New York (hereinafter, "NYSPO"). *See* Dkt. No. 41-5 at 1; Dkt. No. 41-1 at ¶ 18. At NYSPO, Defendant was placed in a small office for an interview and polygraph, which was videotaped.[1] *See* Dkt. No. 51, Interview Video (hereinafter, "Video"). Defendant was given a Polygraph Pre-Test & Specific Issue Background Form (hereinafter, the "Polygraph Form"), which he reviewed outside the presence of law enforcement. *Id.* at 9:12-9:14am.

The video shows that Investigator David Burns, the polygraph examiner, brought Defendant a cup of water and began the interview by telling him, "if you have any questions

[1] In an interview summary completed on June 21, 2017, Agent Fallon noted that they sent Defendant to a polygraph examination to discover whether he had "ever sexually abus[ed] a minor." *See* Dkt. No. 41-5 at 1-2.

along the way, make sure you ask. I can't stress that enough." *Id.* at 9:19-9:22am. Then, starting with the Polygraph Agreement form, Investigator Burns said, "I'm gonna have you read through each paragraph, once you've read through each paragraph and you understand what it means, I'll have you initial just along the sides here." *Id.* at 9:22-9:25am. The video shows Defendant reading each paragraph and initialing. *Id.* Next, Investigator Burns directed Defendant to a *Miranda* waiver, saying, "I'll have you read through . . . this is just like . . . what you see in the movies, you have the right to remain silent," and Defendant asks "initial?" Investigator Burns says "yup, you can initial once you've read each one and understand." *Id.* at 9:26-9:27. After Defendant reads the form and initials, Investigator Burns reads the last question, "do you understand each of these rights," and Defendant signs the form. *Id.* at 9:27-9:28am.

Defendant now says he was "asked many of the same or similar questions as I was asked in my home . . . about children and child pornography," so he "felt like [he] had no choice but to answer the questions." *Id.* *See* Dkt. No. 41-1 at ¶ 19.

B. Procedural History

The United States filed a criminal complaint against Defendant on June 9, 2017, alleging a violation of 18 U.S.C. § 2252A(a)(5)(B) for possession of child pornography. *See* Dkt. No. 1 at 1. On March 1, 2019, Defendant moved to suppress (1) evidence seized during the June 5, 2017 search and (2) the statements from both interviews. *See* Dkt. No. 41 at 1; Dkt. No. 41-2 at 1. The Government opposed that motion on May 10, 2019, and Defendant filed his Reply. *See* Dkt. Nos. 50, 52.

For the following reasons, the motion to suppress is denied.

III. DISCUSSION

A. Evidence Seized During the Search

1. Legal Standard

The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." U.S. Const. amend. IV. "Probable cause 'is a fluid concept' turning 'on the assessment of probabilities in particular factual contexts,' and as such is not 'readily, or even usefully, reduced to a neat set of legal rules.'" *United States v. Raymonda*, 780 F.3d 105, 113 (2d Cir. 2015) (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)) (other quotation omitted). "In evaluating probable cause in any given case, a judge must 'make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *Id.* (quoting *Gates*, 462 U.S. at 238). "Due to this subjective standard, a reviewing court generally accords 'substantial deference to the finding of an issuing judicial officer that probable cause exists,' limiting our inquiry to whether the officer 'had a substantial basis' for his determination." *Id.* (quoting *United States v. Wagner*, 989 F.2d 69, 72 (2d Cir. 1993)).

In this case, the signing judge needed to determine that there was probable cause to believe that Defendant's residence contained photographs or videos depicting minors engaged in "sexually explicit conduct." *See* 18 U.S.C. § 2256(8) (defining "child pornography" as "any visual depiction . . . where (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct"). Federal law defines five broad categories "sexually explicit conduct" for purposes of child pornography, which are "actual or simulated (i) sexual intercourse . . .; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the anus, genitals, or pubic area of any person." 18 U.S.C. § 2256(2)(A); *see also* Dkt. No. 41-3 at 4.

2. Information in the Warrant Application Connecting Defendant's Home to the Files

Defendant argues that there was not probable cause that the investigators would find child pornography in his home, because the warrant contains insufficient information about the IP Address 108.183.10.193 and Investigator Vidnansky's experience with similar investigations. *See* Dkt. No. 41-2 at 14-15.

Based on the totality of information contained in the affidavit, the Court finds that the signing judge had a substantial basis to believe that the downloaded files came from Defendant's home. First, the affidavit adequately explained that an IP address is "a unique number used by a computer to access the Internet," and described how peer-to-peer file sharing networks such as BitTorrent operate. *See* Dkt. No. 41-3 at 3, 7-8. Next, the affidavit adequately described how Investigator Vidnansky obtained the files. *See id.* at 7-8 (stating that he "connected directly to IP Address 108.183.10.193 and downloaded files of interest . . .[that] were located in the 'Share Folder' of IP Address 108.183.10.193. The device at IP Address 108.183.10.193 was the sole candidate for each download, and as such, each file was downloaded directly from said IP Address"). The affidavit sufficiently tied the IP address to Defendant's home using Time Warner Cable's records, and explained that Investigator Vidnansky used the files' SHA-1 values (a type of hash value) to trace them to Defendant's IP address.[2] *See id.* Finally, it was reasonable for the judge to conclude that Investigator Vidnansky knew how to conduct such an investigation, since

[2] Hash values are widely accepted as an accurate means of uniquely identifying digital files. *See, e.g.*, *United States v. Thomas*, 788 F.3d 345, 348 n.5 (2d Cir. 2015) (referring to hash values as the "digital fingerprints" of files); *United States v. Bershchansky*, 958 F. Supp. 2d 354, 374-75 (E.D.N.Y. 2013), *aff'd*, 788 F.3d 102 (2d Cir. 2015) (noting that "[a]lthough the Second Circuit has not directly addressed the reliability of SHA1 values, numerous courts have concluded that SHA1 values constitute a reliable basis on which to find probable cause that a computer contains images of child pornography").

he served on the FBI Child Exploitation Task Force and was conducting a broader investigation into users of BitTorrent who were viewing and downloading child pornography. *See id.*

Thus, the affidavit contains sufficient information to allow the signing judge to "make a practical, common-sense decision" that agents were likely to find those files on Defendant's computer. *See Raymonda*, 780 F.3d at 113.

3. Staleness of the Information in the Warrant Application

Defendant also argues that the search warrant lacks probable cause because the supporting evidence alleged in the affidavit (that Investigator Vidnansky downloaded files containing child pornography on November 2, 2016) was stale. *See* Dkt. No. 41-2 at 15-17.

"[T]he determination of staleness in investigations involving child pornography is 'unique.'" *United States v. Raymonda*, 780 F.3d 105, 114 (2d Cir. 2015) (citing *United States v. Irving*, 452 F.3d 110, 125 (2d Cir. 2006)). "[I]t is well known that images of child pornography are likely to be hoarded by persons interested in those materials in the privacy of their homes," and thus, "evidence that such persons possessed child pornography in the past supports a reasonable inference that they retain those images - or have obtained new ones - in the present." *See id.* (internal quotation marks and citations omitted). However, the "the alleged proclivities of collectors of child pornography, . . . are only relevant if there is probable cause to believe that a given defendant *is* such a collector." *Id.* (emphasis in original) (internal quotation marks and citations omitted). Therefore, at the first step, the judge must make a "preliminary finding that the suspect is a person 'interested in' images of child pornography." *Id.*

In determining whether a suspect is a collector of child pornography, the judge looks to the surrounding circumstances to assess whether the suspect "accessed those images willfully and deliberately, actively seeking them out to satisfy a preexisting predilection." *Id.* at 115

(explaining that courts have considered factors such as whether the defendant is a "pedophile," whether the Defendant has paid to access child pornography, and if the Defendant has an extended history of possessing pornographic images). A single incident of possession may suffice, where, "the suspect's access to the pornographic images depended on a series of sufficiently complicated steps to suggest his willful intention to view the files," or the suspect redistributed that file to others. *Id.*

Defendant argues that this case parallels *Raymonda*, in which the Second Circuit held that evidence that the defendant had accessed child pornography nine months prior was stale and thus, the search warrant was not supported by probable cause. *Id.* at 117. There, the court concluded that the defendant did not access the child pornography images "in circumstances sufficiently deliberate or willful to suggest that he was an intentional 'collector' of child pornography," where he had opened one to three pages of a website containing thumbnail links to images of child pornography, but did not actually click on any thumbnails to view the full-sized files. *Id.* Defendant argues that similarly here, the warrant application did not show that the files of interest "existed as part of child-pornography-collector activity" because it relied on events that were seven months old and did not adequately describe the downloaded files. *See* Dkt. No. 41-2 at 17-18 (noting that the warrant did not state the number of photographs downloaded, how long the files were on Defendant's computer, whether the files were labeled to suggest that they contained child pornography, and how the files could be found through internet searches).

Unlike in *Raymonda*, here the search warrant application demonstrated that Defendant was a collector of child pornography and thus, the evidence from seven months ago was not stale. The affidavit plainly asserts that Defendant used a "peer-to-peer software designed to allow users to engage in the trade and storage of such information," downloaded the images onto his

computer, and saved them within the "Share Folder" of his computer. *See* Dkt. No. 50 at 14-15. Such conduct indicates that he "planned to store the files so that they could continually be accessed at the defendant's pleasure." *See* Dkt. No. 50 at 15. Thus, the Court finds that the warrant application contained sufficient information to demonstrate that defendant "possesses characteristics of a hoarder of child pornography." *See id.* Accordingly, the events from seven months prior to the search warrant application were not stale.

4. Failure to Describe "Child Pornography" or "Files of Interest" and the Good Faith Exception

Finally, Defendant argues that the search warrant was not supported by probable cause because the affidavit did not describe the files that Investigator Vidnansky downloaded from Defendant's "Share Folder." *See* Dkt. No. 41-2 at 9-13. Instead, the affidavit conclusively asserts that Investigator Vidnansky "downloaded files of interest" which "consisted of child pornography," and, upon viewing the files, Investigator Vidnansky, "'found that they *appeared to* depict child pornography.'" *See id.* at 5, 13 (quoting Dkt. No. 41-3 at 8).

The First, Third, and Ninth Circuits have all held that the label "child pornography," without more, is insufficient to establish probable cause for a search warrant when the alleged pornography falls into the fifth category of sexually explicit conduct ("lascivious exhibition of the anus, genitals, or pubic area of any person"). *See United States v. Pavulak*, 700 F.3d 651, 661 (3d Cir. 2012) (holding that "the label 'child pornography,' without more, does not present any facts from which the magistrate could discern a 'fair probability' that what is depicted in the images meets the statutory definition of child pornography and complies with constitutional limits"); *United States v. Battershell*, 457 F.3d 1048, 1053 (9th Cir. 2006) (holding that a search warrant application for child pornography that falls into the fifth category of "sexually explicit conduct"

must include the actual image(s) or factual descriptions of the image(s) so the judge can independently determine whether the image(s) "lasciviously display[] the genitals"); *United States v. Brunette*, 256 F.3d 14, 17 (1st Cir. 2001) (holding that the "bare legal assertion [that the images lasciviously displayed the victim's genitals], absent any descriptive support and without an independent review of the images, was insufficient to sustain the magistrate judge's determination of probable cause"). Those circuits have concluded that unlike the other four categories of sexually explicit conduct, "the identification of images that are lascivious will almost always involve, to some degree, a subjective and conclusory determination on the part of the viewer." *Brunette*, 256 F.3d at 18 (quotation omitted). "That inherent subjectivity is precisely why the determination should be made by a judge, not an agent." *Id.*

Still, that approach is not universally endorsed. *See United States v. Simpson*, 152 F.3d 1241, 1247 (10th Cir. 1998) (holding that "the words 'child pornography' need no expert training or experience to clarify their meaning") (citation and internal quotation marks omitted); *United States v. Smith*, 795 F.2d 841, 848 (9th Cir. 1986) (finding that the "'conclusory' statement that the photographs depicted 'sexually explicit conduct'" was not fatal to the warrant).

Although the question has been raised to the Second Circuit, the Second Circuit has not yet ruled on the issue. *See United States v. Bonczek*, 391 Fed. Appx. 21, 23 (2d Cir. 2010) (declining to resolve the issue where the good faith exception prevented the exclusion of evidence seized under an invalid warrant); *United States v. Jasorka*, 153 F.3d 58, 58 (2d Cir. 1998) (declining to answer whether a judge issuing a warrant "was obligated to make her own assessment of the lascivious nature of the photographs" because the searching officers could rely in good faith on the warrant). In *United States v. Groezinger*, 625 F. Supp. 2d 145 (S.D.N.Y. 2009), the court followed *Battershell* and *Brunette*, and held that a warrant application was not

supported by probable cause where the affidavit failed to "describe the images sent between the [relevant individuals] or state which category of child pornography they fell into." *Id.* at 150. A similar argument was raised in *United States v. Cardona*, No. 14-CR-314, 2015 WL 769577, *5 (S.D.N.Y. Feb. 24, 2015), where the affidavit did not append or describe the images, but simply asserted that "[a victim] provided [the defendant] with approximately five sexually explicit photographs of himself (constituting production and receipt of child pornography)."[3]

Here, since the search warrant application did not identify which category of "sexually explicit conduct" the images fell into, the best practice would have been to append the images or describe them in the affidavit. *See Battershell*, 457 F.3d at 1053. However, the Court need not decide whether the warrant was supported by probable cause that the files contained child pornography, because the searching officers could rely in good faith on the warrant.

"To claim the benefits of the good faith exception, . . . the officer's reliance on the duly issued warrant 'must be objectively reasonable.'" *Raymonda*, 780 F.3d at 117 (quotation omitted). Accordingly, the good faith exception does not apply: "(1) where the issuing magistrate has been knowingly misled; (2) where the issuing magistrate wholly abandoned his or her judicial role; (3) where the application is so lacking in indicia of probable cause as to render reliance upon it unreasonable; and (4) where the warrant is so facially deficient that reliance upon it is unreasonable." *United States v. Clark*, 638 F.3d 89, 100 (2d Cir. 2011). "[T]hese limitations apply not merely in cases of deliberate police misconduct, but also in situations where an officer

[3] In *Cardona* the court found that the affidavit was supported by probable cause because it contained much "more than an isolated assertion concerning the images" - it also included "an overtly sexual conversation that included multiple explicit requests by [the defendant] for pictures of [the victim's] penis." *Id.* (holding that, based on the totality of the circumstances, "there was a substantial basis for the magistrate to conclude that those pictures were 'sexually explicit' within the meaning of § 2256(2)(A)").

is 'reckless' or 'grossly negligent' in seeking or executing a warrant." *Raymonda*, 780 F.3d at 118 (quoting *Herring v. United States*, 555 U.S. 135, 144 (2009)) (other citation omitted).

Defendant argues that the good faith exception should not apply because the magistrate who issued the warrant "wholly abandoned his judicial role" to make an independent, neutral assessment of probable cause. *See* Dkt. No. 41-2 at 18-21. However, the Second Circuit has not yet decided whether the label "child pornography" is sufficient to describe images of "lascivious exhibition of the genitals or pubic area of any person." *See Bonczek*, 391 Fed. Appx. at 23; *Jasorka*, 153 F.3d at 58. Without a clear legal standard to follow, it was not unreasonable for the signing judge to rely on Investigator Vidnansky's opinion that the files "appeared to depict child pornography," an opinion supported by Investigator Vidnansky's experience as a police officer. *See* Dkt. No. 41-3 at 8; *see also Groezinger*, 625 F. Supp. 2d at 157 (applying the good faith exception because "the legal principles that resulted in the nullification of a probable cause determination were unclear at the time that the warrant was issued and . . . the law enforcement official relied in good-faith on the magistrate's probable cause determination"); *Raymonda*, 780 F.3d at 119 (applying the good faith exception where the legal precedent on staleness was a "holding by a district court [which] cannot establish a binding principle of law sufficient to undermine an agent's good faith reliance on a later warrant"). Accordingly, the Court finds that the signing judge did not wholly abandoned his judicial role in signing the search warrant.

Moreover, Defendant does not argue, and there is nothing to suggest, that the agents were reckless or grossly negligent in executing the warrant. Thus, the good faith exception applies, and the Court will not suppress the evidence seized pursuant to the search warrant.

B. Defendant's Statements

1. Interview at Defendant's Home

Defendant has also moved to suppress the statements he made to law enforcement while they searched his home, arguing that the interview in his home was custodial, and thus, "[t]he police were required to advise Mr. Pratt of his Miranda warnings before eliciting the statements." *See* Dkt. No. 41-2 at 22. The Government responds that because the interview in Defendant's home was not custodial, *Miranda* warnings were not required. *See* Dkt. No. 50 at 22-24.

The Fifth Amendment protects individuals from being "compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. "In *Miranda v. Arizona*, the Supreme Court made clear that the prosecution may not use statements made by a suspect under custodial interrogation unless the suspect (1) has been apprised of his Fifth Amendment rights, and (2) knowingly, intelligently, and voluntarily waives those rights." *United States v. Oehne*, 698 F.3d 119, 122 (2d Cir. 2012) (citing *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966)). "The Supreme Court later crafted a prophylactic rule to protect suspects from being pressured into waiving *Miranda* rights after invoking them, holding that 'an accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.'" *Id.* (quoting *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981)).

As the term itself suggests, a "custodial interrogation" requires two elements: (1) an interrogation of a defendant (2) who is in custody. *United States v. FNU LNU*, 653 F.3d 144, 148 (2d Cir. 2011) (quotation omitted). An "interrogation" for *Miranda* purposes is defined as "'questioning initiated by law enforcement officers,'" and includes "'any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *United States v. Rommy*, 506 F.3d 108, 132 (2d Cir. 2007)

(quotations omitted). "Because the underlying purpose of the *Miranda* rule is to dispel compulsion, the relevant inquiry in deciding whether words or actions constitute interrogation focuses 'primarily upon the perceptions of the suspect, rather than the intent of the police.'" *Id.* (quotation and other citations omitted). "As *Miranda* itself recognized, however, '[v]olunteered statements of any kind are not barred by the Fifth Amendment' and, thus, do not require preliminary advice of rights." *Id.* (quoting *Miranda*, 384 U.S. at 478).

A suspect is in custody for purposes of *Miranda* if a reasonable person in the suspect's position would feel "subjected to restraints comparable to those associated with formal arrest." *Georgison v. Donelli*, 588 F.3d 145, 155 (2d Cir. 2009) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 441 (1984)); *see also United States v. Newton*, 369 F.3d 659, 670 (2d Cir. 2004) (holding that "the ultimate inquiry for determining *Miranda* custody is . . . whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest") (quotation omitted). That inquiry is objective, and must take into account the totality of the circumstances surrounding the encounter, including "the interrogation's duration; its location, (*e.g.* at the suspect's home, in public, in a police station, or at the border); whether the subject volunteered for the interview; whether the officers used restraints; whether weapons were present and especially whether they were drawn; whether officers told the suspect he was free to leave or under suspicion; . . . and . . . the nature of the questions asked." *FNU LNU*, 653 F.3d 144, 153 (2d Cir. 2011) (citations omitted).[4]

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[4] The Second Circuit has not decided which party carries the burden of proof with respect to custody. *See United States v. Simmonds*, 641 Fed. Appx. 99, 102 (2d Cir. 2016) (declining to decide the issue "because we conclude that the totality of the circumstances show that [the defendant] was not in custody regardless of which party had the burden of proof"); *United States v. Beal*, 730 Fed. Appx. 30, 33 (2d Cir. 2018) (noting "some dispute over which party carries the burden of proving that a defendant was in custody," but declining to decide that issue because, in

(continued...)

In *United States v. Faux*, 828 F.3d 130 (2d Cir. 2016), the Second Circuit reversed the district court's finding that the defendant was in custody. In that case, approximately ten to fifteen agents executed a search warrant at the defendant's home at around sunrise. *See id.* at 132. During the search, the defendant was questioned for two-hours in her dining room, apart from her husband, and was not allowed to move freely about her home. *See id.* at 133. An agent escorted the defendant to the bathroom, where the agent stood outside, and to her bedroom so that she could get a sweater. *See id.* The agents never told her that her participation was voluntary or that she was free to leave. *See id.* at 134. Approximately twenty minutes into the interview, agents told the defendant that she was not under arrest. *See id.* The agents also seized the defendant's cell phone. *See id.* at 133. The Second Circuit concluded as follows:

> On this record, and given our precedents, it must be concluded that [the defendant] was not in custody. True, the two-hour interview was conducted while officers swarmed about her home. But she was told 20 minutes into the interview that she was not under arrest; she was never told that she was *not* free to leave; she did not seek to end the encounter, or to leave the house, or to join her husband; the tone of the questioning was largely conversational; there is no indication that the agents raised their voices, showed firearms, or made threats. Her movements were monitored but not restricted, certainly not to the degree of a person under formal arrest. She was thus never "completely at the mercy of" the agents in her home.

Id. at 138-39. The Second Circuit also noted that "courts rarely conclude, absent a formal arrest, that a suspect questioned in her own home is 'in custody.'" *Id.* at 135-36.

In this case, Agents Fallon and Kowalski interviewed Defendant in his own home for an hour and forty minutes while other agents "swarmed about [his] home." *See id.* at 138-39. The audio recording shows that Defendant never asked to end the interview, was never told that he

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[4](...continued)
that case, the defendant "was in custody regardless of which party had the burden of proof").

could not leave, and never asked to check on his wife or to join her in the other room. Although the agents were dressed in law enforcement uniforms with bullet proof vests, *see* Dkt. No. 41-1 at ¶¶ 4-5, the interview tone was conversational, and the agents never raised their voices or threatened Defendant. In fact, as the Government notes, "Defendant provided most of the information without being prompted by law enforcement questioning and felt comfortable to elaborate on his own answers to questions," and "was rarely interrupted and allowed to speak freely." *See* Dkt. No. 50 at 6; *see also, e.g.*, Audio at 0:5:07-0:7:17 (stating that he has "seen things on BitTorrent that are underage . . . I have seen in my lifetime child pornography not that I've saved, not that I've searched"); *id.* at 0:26:36-0:28:06 (stating, unprompted, that "there was one month when my computer was overrun by so-called child pornography stuff"). Thus, given the totality of the circumstances, no reasonable person in Defendant's position would have "understood his freedom of action to have been curtailed to a degree associated with formal arrest." *Newton*, 369 F.3d at 672.

The fact that an agent was standing in the doorway to obstruct Defendant's exit from the room, *see* Dkt. No. 41-1 at ¶¶ 9-11, does not change the Court's conclusion, because a reasonable person would have understood this "limited restriction on his freedom of movement as necessary to protect the integrity of the ongoing search," *see United States v. Schaffer*, 851 F.3d 166, 174 (2d Cir. 2014) (finding that an interview was not custodial although an agent twice denied the defendant's request to leave). In *Schaffer*, the court reasoned that "(1) [the defendant] was not handcuffed or otherwise physically restrained during his interview; (2) at no point did any of the agents have their weapons drawn; (3) the agents interviewed [the defendant] in the familiar surroundings of his office and permitted him to drink coffee and smoke cigarettes; (4) the agents informed [the defendant] that he was not under arrest; (5) [the defendant] voluntarily agreed to

speak with the agents; (6) the interview lasted only about an hour; and, (7) there was no evidence that [the defendant] asked for an attorney or that the agents denied a request for an attorney." *See id.* Likewise here, Defendant was not arrested or physically restrained during the interview, the agents never drew their weapons, the interview lasted approximately an hour and a half and took place in the familiar surroundings of Defendant's home, agents allowed Defendant to put on socks and shoes and to use the bathroom, Defendant never asked to stop answering questions or end the interview, and Defendant never asked for an attorney. Thus, a reasonable person would not have thought that he was in custody during this interview.

Still, Defendant argues that the fact he was separated from his disabled wife "should weigh heavily in favor of a finding that his statements were not voluntary." *See* Dkt. No. 41-2 at 26; *see also id.* at 23-24 (stating that Defendant suffered from "extraordinary alarm and fear" because he was put in a "particular small room . . . where he would not have access to his severely disabled wife"); Dkt. No. 41-1 at ¶¶ 11-12 (stating that he was "extremely concerned about his wife's well-being," but he was "not allowed to go to her, to speak to her or even simply to look to see if she was o.k."). As is evident on the audio recording, Defendant never once expressed concern about his wife's well-being or asked to check on her. Moreover, Defendant spoke to the agents casually, and did not sound extraordinarily alarmed, afraid, or upset during the interview. Thus, the Court finds that this was not a custodial interview.

Accordingly, the motion to suppress the statements from the first interview is denied.

2. Interview at the New York State Police Office

Defendant argues that since that first interview violated his *Miranda* rights, his statements from the interview at the NYSPO should be suppressed under *Missouri v. Seibert*, 542 U.S. 600 (2004) as an impermissible two-step strategy to circumvent his *Miranda* rights. *See* Dkt. No. 41-

2 at 26-28. The Government rejects this claim and points out that Defendant knowingly and voluntarily waived his *Miranda* rights before the second interview. *See* Dkt. No. 50 at 22-28.

For a waiver of a defendant's *Miranda* rights to be voluntary, it must have been "the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Moran v. Burbine*, 475 U.S. 412, 421 (1986). The defendant must have "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.*; *see also United States v. Taylor*, 745 F.3d 15, 23 (2d Cir. 2014). Generally, a suspect who reads, acknowledges, and signs a waiver form before making a statement has knowingly and voluntarily waived his *Miranda* rights. *United States v. Plugh*, 648 F.3d 118, 127-28 (2d Cir. 2011).

In *Seibert*, the Second Circuit provided the following analysis for determining whether law enforcement used an impermissible two-step strategy:

> First, was the initial statement, though voluntary, obtained in violation of the defendant's *Miranda* rights? If not, there is no need to go further. If the initial statement was obtained in violation of the defendant's *Miranda* rights, has the government demonstrated by a preponderance of the evidence, and in light of the totality of the objective and subjective evidence, that it did not engage in a deliberate two-step process calculated to undermine the defendant's *Miranda* rights? If so, the defendant's post-warning statement is admissible so long as it, too, was voluntary; if not, the post-warning statement must be suppressed unless curative measures (designed to ensure that a reasonable person in the defendant's position would understand the import and effect of the *Miranda* warnings and waiver) were taken before the defendant's post-warning statement.

United States v. Moore, 670 F.3d 222, 229-30 (2d Cir. 2012) (internal citations omitted). Courts look at "the totality of the objective and subjective evidence surrounding the interrogations in order to determine deliberateness." *United States v. Williams*, 681 F.3d 35, 41 (2d Cir. 2012) (quotation omitted). "[T]he Government bears the burden of disproving by a preponderance of the evidence that it employed a deliberate two-step strategy." *Id.* (quotation omitted).

Here, the Court agrees with the Government that Defendant knowingly and voluntarily waived his *Miranda* rights before the interview at the NYSPO.[5] Defendant read and signed the Polygraph Form and *Miranda* waiver, initialing next to each paragraph to indicate his comprehension. *See* Video at 9:12-9:28am. Investigator Burns explained the forms to Defendant and gave him ample opportunity to ask questions. *Id.* at 9:19-9:22am. Thus, Defendant was fully aware of the nature of the right being abandoned and the consequences of his decision to abandon it. *See Moran*, 475 U.S. at 421; *see also Plugh*, 648 F.3d at 127-28 (2d Cir. 2011).

Additionally, since the initial interview was not custodial, and did not violate Defendant's *Miranda* rights, Defendant's *Seibert* claim also fails. *See Moore*, 670 F.3d 229-30 (noting that if the initial statement, though voluntary, was not obtained in violation of the defendant's *Miranda* rights, "there is no need to go further"). Accordingly, the totality of the evidence surrounding both interviews shows that the Government did not engage in a "deliberate two-step process calculated to undermine the defendant's *Miranda* rights." *See id.* at 229-30.

As such, the motion to suppress the statements made at the NYSPO is denied.

C. Request for Evidentiary Hearing

"A defendant who is moving to suppress evidence is not automatically entitled to an evidentiary hearing." *United States v. Harun*, 232 F. Supp. 3d 282, 285 (E.D.N.Y. 2017) (citing *United States v. Barrios*, 210 F.3d 355, 355 (2d Cir. 2000)). "'[A]n evidentiary hearing on a motion to suppress ordinarily is required if the moving papers are sufficiently definite, detailed, and nonconjectural' to enable a court to conclude that there are contested issues of fact." *Id.* (quoting *Jones v. United States*, 365 Fed. Appx. 309, 310 (2d Cir. 2010)). "Put differently,

[5] Although the Government raised this point in their Opposition, Defendant has not argued that his waiver was not knowing and voluntary.

[a]bsent a contested issue of material fact, a defendant is not entitled to an evidentiary hearing." *Id.* (internal quotation omitted). "Moreover, there are requirements as to what sort of evidence can create a factual dispute that would necessitate an evidentiary hearing on a motion to suppress. It is well-settled that a hearing is not required if a defendant fails to support his factual allegations with an affidavit from a witness with personal knowledge." *Id.* (citing *United States v. Mottley*, 130 Fed. Appx. 508, 510 (2d Cir. 2005)) (other citation omitted).

Defendant requests an "evidentiary hearing to resolve disputed facts, if any, essential to a determination on the motions [sic] to suppress." *See* Dkt. No. 41-2 at 1; *see also id.* at 28; Dkt. No. 52 at 6-7. The Government does not oppose that request because, it claims, there are questions of fact in dispute about the admissibility of Defendant's statements. *See* Dkt. No. 50 at 28. The Court disagrees, because the moving papers have not demonstrated that there are disputed facts essential to the resolution of this motion. Accordingly, Defendant's request for an evidentiary hearing is denied.

IV. CONCLUSION

After carefully reviewing the entire record in this matter, the parties' submissions and the applicable law, and for the above-stated reasons, the Court hereby

ORDERS that Defendant's Motion to Suppress (Dkt. No. 41) is **DENIED**; and the Court further

ORDERS that Defendant's request for an evidentiary hearing is **DENIED**; and the Court further

ORDERS that the Clerk of the Court shall serve a copy of this Memorandum-Decision and Order on the parties in accordance with the Local Rules.

IT IS SO ORDERED.

Dated: July 2, 2019
Albany, New York

Mae A. D'Agostino
U.S. District Judge